93-923

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JAMES R. ANDERSON,

Petitioner,

vs.

DOUGLAS COUNTY;
DENNIS NAGEL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED FOR REVIEW

Whether respondents violated any of petitioner's Constitutional rights, as applied through 42 USC 1983, including rights of substantive due process, procedural due process, equal protection and commerce clause.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 4 F.2d 574 (8th Cir. 1993) and is printed in the Appendix (hereafter A) at A1. The judgment of the United States District Court is not reported and is printed at A11.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 30, 1993. A timely petition for rehearing was denied on October 1, 1993 (A41). This Petition has been filed within 90 days of said date. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves the Constitutional provisions of substantive due process, procedural due process, equal protection and commerce clause, as applicable through 42 USC 1983. 42 USC 1983 is reprinted at A42. The fourteenth amendment to the U.S. Constitution, due process, is reprinted at A42.

STATEMENT OF THE CASE

In July, 1991 the city of Minneapolis desired to "thin spread" petroleum contaminated soil on farm property

that Anderson owned within Douglas County, Minnesota. "Thin spreading" is a means of allowing underground petroleum in the soil to biodegrade naturally, as opposed to the use of chemicals, burning, etc. The Minnesota Pollution Control Agency oversees and regulates thin spreading in Minnesota, and the PCA official in charge of this task testified that thin spreading is a "safe and effective" means of placing a thin layer of petroleum contaminated soil on top of the ground, where the plant/animal based petroleum contaminants will naturally biodegrade, and that such presents no threat to the public health or safety or welfare when supervised by the PCA, as would occur in this instance. Fertilizers, for example, are petroleum based and thin spreading "grows quite a corn crop". [Appeals Court Appendix (hereafter ACA) 77, 78, 81, 87-88, 150, 153, 217-219, 223-226, 560, 578-579, 600-601, 1031, 1033, 1059, 1102 (#16 and 17)].

Accordingly, the PCA was reviewing and approving this project. The essence of this litigation is that at this point Douglas County invoked its zoning law and prohibited Anderson from allowing the city of Minneapolis to thin spread on his property. Anderson contends that Douglas County has and had no articulable public health or safety or welfare reason for the denial, but rather denied the thin spreading simply because certain county officials did not know much about thin spreading and had an unjustified fear of thin spreading. Unknown to Anderson until after litigation began, Douglas County, several months prior to the Minneapolis matter arising, by formal Douglas County Board action, had determined that no permission would be given to thin spread petroleum contaminated soil *which would originate outside of Douglas*

County (ACA 1030, 1065). Anderson showed that Douglas County itself, at the time it used its zoning law to prohibit Anderson's thin spreading, was pursuing its very own thin spreading, without proceeding under the supposedly applicable zoning law (ACA 1092-1096, 1101-1103, 1010-1011).

When the city of Minneapolis could not spread this soil on Anderson's property at the agreed price of $130,000.00 it was forced to find an alternative spreading location for which it then paid $552,500.00 (ACA 81-85). The petroleum contaminants in this soil have since biodegraded to the point that "no hydrocarbons were detected" and the spreading caused no health or safety or welfare problem (ACA 1033, 1064).

REASONS FOR GRANTING THE WRIT

Petitioners contend that the various Circuits, including the Eighth Circuit which is split upon itself, have rendered decisions which are in conflict with each other, and even within themselves now, on the matter of substantive due process as it applies to property rights (zoning).

There is universal uncertainty among the Circuits as to how to deal with zoning cases which are alleged to be violative of substantive due process. The Sixth Circuit has just undertaken an exhaustive review, and has performed an excellent analysis of where each of the various Circuits stands on this matter, and has concluded, *Pearson vs. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992):

The lack of uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process" category is remarkable.

The Eighth Circuit in 1987 assembled en banc to address this issue, and apparently split into two camps, leaving the matter an "open question" and declining to assemble again to close the question (A41). A large minority concurrence in the 1987 case, drawing on prior Eighth Circuit law, declared that there is not really any such thing as substantive due process itself, and said the concept is an "oxymoron" and a "linguistic monstrosity". *Lemke vs. Cass Co., Nebraska,* 846 F.2d 469 (8th Cir. 1987) at 471. But, the concurrence then seemed to take the approach that although substantive due process does not or should not exist, it would be given lip service as a sort of sacred icon, and we must pretend it exists, but then we must further pretend that its standards are so high that no case shall ever likely fall within its bounds (see also Appeals Court decision at A5-6). Since *Lemke,* some Eighth Circuit decisions take the position of the majority in *Lemke,* that this property/substantive due process issue is still an "open question" in the Eighth Circuit, [*Condor Corp. vs. City of St. Paul,* 912 F.2d 215 at 220 (8th Cir. 1990)], and some decisions now hold that the minority concurrence in *Lemke* is the law within the Eighth Circuit, [*Chesterfield Development Corp. vs. City of Chesterfield,* 963 F.2d 1102 (8th Cir. 1992)]. See *Pearson* footnote 39. The major thrust of the Eighth Circuit at the moment seems to be that of avoiding the entire issue (A5-6, 41).

The *Pearson* Court declares at 961 F.2d 1217 that this Supreme Court has never laid down "definitive standards

of review" here, and this uncertainty in this particular area of the law means an expanding flow of these cases to the Circuit Courts. But, there is some Supreme Court law[1] on the matter [*City of Eastlake vs. Forest City Enter., Inc.*, 426 U.S. 668, 676 (1976) quoting *Village of Euclid vs. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) see footnote 75 to *Pearson*] which many lower Courts are more or less ignoring, apparently on account of a preference to avoid zoning cases, which desire is no doubt fueled by this present situation. The *Pearson* court was thus too kind in that it may have been more correct to say that present Supreme Court standards are not exactly absent, but rather overlooked or ignored, and thus the division of Circuits. For example, in this case, the District Court acknowledged the *Euclid* standard, but declared in light of the progeny of *Lemke* that the Eighth Circuit had adopted a "heightened standard" (see footnote 6 at A26). Indeed it has. In any event, the District Court apparently concluded that Anderson had met the Supreme Court *Eastlake/Euclid* standard, but not the Eighth Circuit "heightened" standard. If not, there would have been no need to talk of "heightened standards". Yet, as this Court just determined in *Leatherman vs. Tarrant County*, 122 L.Ed. 517, 523-524, 113 S. Ct. 1160, 1163 (1993), "heightened standards" are different standards. The lack of clear (or more precisely, current and emphatic) precedent here makes for interesting doings.

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[1] If a zoning ordinance has "no substantial relation to the public health, safety, morals or general welfare" it is a violation of substantive due process.

If there indeed is such a thing as substantive due process, and if a governmental interference with a property right has no relation to the public health or safety or welfare, how can it not be a violation of substantive due process, exactly as this Court ruled in *Eastlake/Euclid?* The *Pearson* Court found at 961 F.2d 1223 that it will be difficult for a plaintiff to present a case rising to the *Eastlake/Euclid* standard – but, to pretend there is a higher standard yet is really a rather transparent abdication from this area of Constitutional rights protection. Some of the Circuit decisions could almost be read to imply that it is a more lofty goal to avoid a zoning case than to uphold the Constitution. But, maybe the best way to avoid such cases, if this is a goal, is to finally lay down a clear and current standard of law in this area, rather than allow abdication or revolt. The entire *Pearson* decision, I respectfully submit, is a not very veiled plea for review, by a Circuit which has studied this issue to the ultimate. This escalating problem will only grow worse with each new Circuit decision until one current and concise standard is given by this Court. It is of no benefit, and of considerable detriment, to allow to fester a situation which is yielding the various unintended but certain fruits we now see before us. As the Sixth Circuit declared, the present "lack of uniformity" is "remarkable".

The current state of the law in this area has spawned four questions, from basic to immediate. Is there such a thing as substantive due process? If so, does it protect rights of property, as well as other rights? If so, are rights of property full or now second class Constitutional rights? What uniform standard shall the Circuits apply?

CONCLUSION

Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Dated: December 8, 1993

Respectfully submitted,

/s/ James R. Anderson
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

92-3758/92-3959

James R. Anderson, Appellant/Cross-Appellee, v. Douglas County; Dennis Nagle, Appellees/Cross-Appellants.	*	Appeal from the United States District Court for The District of Minnesota.

Submitted: June 14, 1993

Filed: August 30, 1993

Before JOHN R. GIBSON, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This appeal arises from the district court's grant of summary judgment to defendants in an action brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, raising equal protection and due process issues in a land-use dispute, and also alleging common-law conspiracy.

Appellant James Anderson, owner of a parcel of land in Alexandria Township, Douglas County, Minnesota, sought to use the land to "thinspread" certain contaminated soil generated by the City of Minneapolis. Thinspreading is a method of soil treatment by which petroleum-contaminated soil is incorporated into healthy, native soil so that the naturally occurring microorganisms in the native soil biodegrade the petroleum. In response to Anderson's general inquiry about thinspreading in May, 1991, a Minnesota Pollution Control Agency (MPCA) representative in Douglas County inspected Mr. Anderson's land. As noted in the MPCA document on Land Application of Petroleum-Contaminated Soil, that agency's approval of thinspreading is contingent on compliance with applicable zoning ordinances and requirements and approval by local governmental authorities.

The City of Minneapolis contacted Mr. Anderson on July 9, 1991 regarding the availability of his land for the disposal of certain contaminated soil. Although Mr. Anderson and City of Minneapolis negotiated price, they did not enter into a firm contract because Mr. Anderson's ability to perform the thinspreading was contingent on local approval by the City's July 25, 1991, deadline.

Anderson contacted the Alexandria Township Board on July 10 and received their approval of the thinspreading on July 17. Anderson next sought the approval of the Douglas County Planning and Zoning Commission and contacted Dennis Nagle, the Zoning Administrator on July 17. Nagle informed plaintiff that a "conditional use permit" would be required and sent Anderson a permit application, information summarizing the permit application process, and relevant portions of the Douglas County

Zoning Ordinance. Anderson did not appeal the requirement of a conditional use permit to the Board of Adjustment, as he was entitled to do under the Douglas County Zoning Ordinance. Anderson submitted his application on July 22, and pursuant to the process by which conditional use permits are issued, the Douglas County Zoning and Planning Commission held a public hearing after first giving ten days' notice of the proceeding. At that hearing on August 6, 1991, the Commission voted to recommend denial of the permit, and the County Board approved that recommendation on August 13. The reasons stated by the Board included Anderson's failure or refusal to explain the proposal; lack of separation of site from residential, zoned land and adverse effect on that land; lack of conformity with the county's land use plan; inconsistency with ordinance goals of promoting public health, safety, comfort and welfare of Douglas County people; and opposition from area property owners. Finally, the Board indicated that the application was inconsistent with its policy, "adopted November 13, 1990, regarding thin spreading of contaminated soil originating outside Douglas County." Meanwhile, on July 25, 1991, the City of Minneapolis had informed Anderson that it could no longer consider his site for thinspreading because he had not yet received approval.

Anderson brought this action against various parties in September, 1991. The final amended complaint lists only Douglas County and Dennis Nagle as defendants. Anderson's suit alleged violation of his constitutional rights to due process and equal protection, as well as conspiracy to violate those rights. Anderson claimed damages in the amount he would have received from the

City of Minneapolis for the anticipated thinspreading contract. On cross motions for summary judgment, the district court ruled in favor of defendants. Anderson appeals, arguing that violation of his equal protection and due process rights by the Douglas County and Nagle subjects Nagle to liability under 42 U.S.C. § 1983. Anderson also argues that the defendants engaged in a conspiracy. Defendants cross-appeal the district court's denial of their request for fees.

I.

Anderson contends that denial of his application to thinspread violated his Fourteenth Amendment right to equal protection because he was required to obtain a conditional use permit, a requirement apparently not imposed on applicants until 1991. Anderson relies upon the fact that before 1991 thinspreading was considered a permitted use under the Douglas County Zoning Ordinance and did not require any specific approval by local zoning authorities.

A party claiming a violation of equal protection must establish that he or she is "similarly situated" to other applicants for the license, permit, or other benefit being sought, particularly with respect to the same time period. Anderson failed to establish that similarly situated persons did not have to obtain conditional use permits. Indeed, the only evidence he presented tends to prove that other parties submitting thinspreading applications in 1991 were also required to obtain conditional use permits. As for the pre-1991 applicants, a city or county is entitled to change its interpretation of an ordinance as

long as there is a rational basis for the change. *Carolan v. City of Kansas City*, 813 F.2d 178, 181 (8th Cir. 1987); *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991). Nagle testified in his deposition that he determined in 1991 that thinspreading, previously a "permitted use", should be reclassified as a "conditional use" because of the growing number of thinspreading applications and because of the public health issues associated with disposal of contaminated soils. We cannot say that Nagle's decision to regulate thinspreading more closely was without a rational basis.

II.

Anderson contends that denial of the conditional use permit violated his right to substantive due process. Specifically, he argues that the decision to require a conditional use permit for thinspreading was irrational because it was not related to public health, safety, or welfare concerns. Anderson also contends that any attempt to apply county zoning regulations to this type of thinspreading is unlawful because local authority to regulate petroleum-contaminated soil is in conflict with state and federal law.

A plaintiff asserting a substantive due process claim must establish that the government action complained of is "truly irrational", that is, "something more than . . . arbitrary, capricious, or in violation of state law." *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) (quoting *Lemke v. Cass County*, 846 F.2d 469, 470-72 (8th Cir. 1987) (en banc) (Arnold J., concurring)). To illustrate this heightened standard for substantive due

process claims in the zoning context, the *Chesterfield* court gave as an example of such irrationality a zoning ordinance applying only to persons whose names begin with a letter in the first half of the alphabet. *Chesterfield*, 963 F.2d at 1104. We agree with the district court that Anderson has failed to present evidence from which a reasonable fact-finder could conclude that Douglas County's decision not to allow the thinspreading was "truly irrational."

Anderson also contends that Douglas County cannot regulate thinspreading because the City of Minneapolis, as the real party in interest with regard to the thinspreading, has the power under a Minnesota statute to condemn the land for that purpose. Anderson cites *Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972), for the proposition that this local zoning ordinance cannot prevail against a city with the power of eminent domain. We agree with the district court that Town of Oronoco does not stand for so broad a proposition. The Minnesota Supreme Court in *Town of Oronoco* adopted a "balancing-of-public-interests test for the resolution of conflicts between the exercise by governmental agency of their police power and their right of eminent domain." *Town of Oronoco*, 197 N.W.2d at 429. Even assuming that the City of Minneapolis is the real party in interest because of its need to dispose of the contaminated soil, we cannot say that need outweighs the county's interest in regulating thinspreading for reasons related to public health, safety, and welfare. This is especially so here because the City of Minneapolis was able to secure another site for the thinspreading.

Finally, Anderson argues that, under Minnesota law, local authorities may not regulate environmental protection and resource recovery. Anderson directs us to a provision of the Minnesota statutes that provides that when the MPCA "has requested a person who is responsible for a release or threatened release [of waste] to take any response action . . . no political subdivision shall request or order that person to take any action that conflicts with the action requested by the [MPCA]." Minn. Stat. § 115B.17, subd. 11 (1987). Anderson argues that the MPCA's oversight of waste disposal and their preliminary approval of his site precludes regulation by local entities. His argument, however, ignores the authority given to local governmental units to regulate waste to the extent that such regulation does not conflict with state regulation. *See* Minn. Stat. §§ 400.16 (1982) and 400.161 (1981). It also ignores local authority to regulate land use. *See* Minn. Stat. § 394.21, subd. 1 (1959). Indeed, the MPCA application for spreading of soil indicates that local regulations may apply. Conflict exists only when an ordinance and a statute contain express or implied terms that are irreconcilable; no conflict exists where an ordinance is merely additional and complementary to, or in aid or furtherance of, a statute. *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 143 N.W.2d 813 (1966). The authority of the MPCA does not here conflict with that of the local government entities. It is, if anything, complementary. Anderson has similarly failed to establish any conflict between local regulation and federal environmental regulations.

III.

Anderson also argues that the local decision not to allow the thinspreading denied his right to procedural due process. In the zoning context, assuming a landowner has a protectable property interest, procedural due process is afforded when the landowner has notice of the proposed government action and an opportunity to be heard. *See Littlefield v. City of Afton*, 785 F.2d 596, 603 (8th Cir. 1986). (For further elaboration on *Littlefield* and substantive due process, as opposed to procedural due process, see *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir. 1992).) Anderson contends that his right was denied because the volatile nature of the August 6 public hearing prevented him from effectively presenting his case. We disagree. Anderson not only had an opportunity to present his case to the zoning commission on August 6, he also received notice of the August 13 County Board meeting where he could have asked the Board not to approve the zoning board recommendation. But Anderson did not attend the August 13 meeting, nor did he appeal the requirement of a conditional use permit to the Board of Adjustment. Anderson cannot complain of a violation of procedural due process when he has not availed himself of existing procedures. *See Suckle v. Madison General Hosp.*, 499 F.2d 1364, 1366-67 (7th Cir. 1974).

IV.

Anderson also alleges that Douglas County and Alexandria Township conspired against him to violate his

constitutional rights and to deny him permission to thin-spread. He alleges that Nagle and an Alexandria Township official both opposed his application and exchanged information about it before either the township or county reached a decision. Common-law conspiracy involves a combination of persons to accomplish either an unlawful purpose or a lawful purpose by unlawful means. *Harding v. Ohio Casualty Ins. Co.*, 230 Minn. 327, 337, 41 N.W.2d 818, 824 (1950), *cited in American Computer v. Jack Farrell Implement*, 763 F.Supp. 1473, 1489 (D.Minn.1991). To prove conspiracy, a party must specifically present facts tending to show agreement and concerted action. Conclusory allegations are insufficient. *See Sooner Prod. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983). In the preceding analysis we have concluded that no unlawful purpose was achieved. Anderson has failed to allege specific facts that would create an issue of material fact as to the existence of a conspiracy between Douglas County and Alexandria Township to use unlawful means to achieve what we have concluded is a lawful end. The district court therefore correctly granted the defendants' summary judgment motion.

V.

Finally, we consider defendants' cross appeal for attorneys fees. Defendants contend that they are entitled to fees under Rule 11 of the Federal Rules of Civil Procedure or the Minnesota equivalent. Minn. Stat. § 549.21 (1986). We reverse a trial court's denial of fees only in the event of an abuse of discretion. *See, e.g., NAACP-Special Contribution Fund v. Atkins*, 908 F.2d 336, 339 (8th Cir. 1990) (citing *Cooter & Gill v. Hartmarx Corp.*, 496 U.S. 384

(1990)); *National Recruiters, Inc. v. Toro Co.*, 343 N.W.2d 704, 708-09 (Minn. App. 1984). While we note that the plaintiff, a lawyer appearing pro se, appears to have sometimes acted with unbridled zeal, we cannot say that the district court abused its discretion in denying defendants motion for fees. Because defendants do not argue that they are entitled to fees under 42 U.S.C. § 1988, we need not consider that alternative basis for an award.

VI.

For these reasons, we affirm.

A true copy,

Attest:

U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

James R. Anderson,

Plaintiff,

v.

County of Douglas and Dennis Nagle,

Defendants.

CV 3-91-574

Memorandum Opinion and ORDER

James R. Anderson, Anderson Law Office, Marshall, Minnesota, pro se.

Scott T. Anderson and Jay T. Squires, Ratwik Roszak Bergstrom Maloney and Bartel, Minneapolis, Minnesota for defendants.

Introduction

This matter comes before the Court on plaintiff James R. Anderson's ("plaintiff") and defendants Douglas County's and Dennis Nagle's ("Nagle") cross-motions for summary judgment. Plaintiff has alleged violations of his equal protection and due process rights and conspiracy, pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, and common law conspiracy. Plaintiff also moves, in the alternative, and in the event his Motion for Summary Judgment is denied in whole or in part, for leave to amend his complaint to allege a violation of his "constitutional right

of Commerce, article I, Section 8" and to allege punitive damages against defendant Nagle, and "for such expanded time to make said Motion and Amendment as shall be appropriate." Notice of Motion and Motion, July 29, 1992.

Background

I. FACTUAL HISTORY

Plaintiff owns a parcel of land in Alexandria Township, Douglas County, Minnesota, on which he sought to "thinspread"[1] certain contaminated soil generated by the City of Minneapolis. The soil was the product of the City's Motley Bypass road project, and due to certain time constraints, the City had to find, and secure state and local government approval for, a disposal site by July 25, 1991. The disposal site the City originally planned to use was in Bryn Mawr, located in the Minneapolis metropolitan area; due to neighborhood opposition, that plan fell through on approximately July 3, 1991.

On July 9, 1991, the City, through Mr. Bo Spurrier, an engineer with the Minneapolis Public Works Department, and Foth & Van Dyke, the City's consultants, contacted plaintiff regarding the availability of his land for the soil disposal. Plaintiff had first inquired into thinspreading

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[1] "Thinspreading" of contaminated soils is method of soil treatment. The process involves incorporating petroleum-contaminated soil into the top 6" and 8" of "native" soil, thereby allowing the naturally occurring soil microorganisms to biodegrade the petroleum. *See* Defendants' Exh. 1, MPCA document entitled Land Application of Petroleum Contaminated Soil: Single Application Sites.

generally, in May, 1991, and Douglas Bellefeille, the Minnesota Pollution Control Agency ("MPCA") representative in charge of thinspreading in Douglas County, physically inspected his property. MPCA approval of thinspreading on plaintiff's land was contingent on compliance with any applicable local zoning ordinances and requirements and approval by local governmental authorities. *See* Exh. 1, Land Application document, p. 1.

In negotiations between plaintiff and the City of Minneapolis, a price of $20 per cubic yard for 3,660 cubic yards of contaminated soil was discussed. No firm contract was entered into, as Anderson's ability and permission to thinspread the soil was contingent on the necessary local approvals within the time frame specified by the City. Defendants' Exh. 5, Spurrier Deposition, pp. 38-39.

Plaintiff sought to secure local approval from the Alexandria Township Board and the Douglas County Planning and Zoning Commission. On July 10, plaintiff contacted the Alexandria Board, and scheduled a meeting before the Board on July 15. At this meeting, the Board passed a resolution prohibiting thinspreading on plaintiff's land. Thereafter, upon advice from plaintiff and Alexandria Township attorney, Ralph Tillitt, the Board reversed its decision and "signed off" on the project on July 17. Plaintiff's September 3, 1992 Affidavit, p. 2. After receiving Alexandria Township's approval, plaintiff contacted Dennis Nagle, Douglas County Zoning Administrator in the afternoon of July 17. Nagle informed plaintiff that a "conditional use permit" ("CUP") would be

required[2] for thinspreading, and sent plaintiff a permit application, a sheet summarizing the permit application process, and the relevant portions of the Douglas County Zoning Ordinance. Defendants' Exh. 6, July 17, 1991 letter from Nagle to Anderson.

Under the Douglas County Zoning Ordinance, CUPs are required for any land use which is not designated a "permitted use." In the case of thinspreading, Nagle determined that such use was not a "permitted use" under agricultural preservation district zoning, but rather fell into the category 3.1. for "refuse areas, dumps and sanitary landfills" listed under "conditional uses." Defendants' Exh. 3, Douglas County Zoning Ordinance, p. 11. From April 1990 to May 1991, five applications were made to Douglas County to thinspread. Three of them were approved by signature of Nagle, and two went directly to the County Board of Commissioners for approval as "permitted uses." Defendants' Exh. 2, Nagle Deposition, pp. 28-31, 39, 45, 50, 58-59.

However, sometime in 1991, Nagle determined that thinspreading was *not* a "permitted use" under agricultural preservation district zoning, but rather a "conditional use" requiring a CUP. *Id.* at pp. 51-52. Although

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[2] Plaintiff claims that he first spoke to the Douglas County Zoning Office on July 9 and 10, and that, at the time, the person or persons with whom he spoke did not inform him of the CUP requirement. Even if this is true, such a disputed fact is not material as the County may not be estopped from changing a previously incorrect interpretation, even if a party has relied on the first interpretation to his detriment. *See* p. 14 *infra*.

Nagle is unable to say exactly when he made this decision, he has stated that the decision was in response to the growing number of thinspreading applications, and the public health issues surrounding the disposal of contaminated soils in Douglas County. *Id.* at pp. 12-14, 19-21.

The procedure for obtaining a CUP requires the completion of the CUP application and payment of the filing fee. The application is referred to the Douglas County Planning and Zoning Commission for a public hearing. The zoning ordinance requires notice of the hearing to be published ten days before the hearing. The Commission considers the application and public sentiment, and gives a recommendation to the County Board within 60 days after the public hearing. The County Board must then take action within 60 days after receiving the recommendation. Defendants' Exh. 3, Douglas County Zoning Ordinance, pp. 70-71. "An appeal from any order, requirement, decision or determination of any administrative official charged with enforcing this ordinance may be made to the Board of Adjustment." *Id.* at 71.

When plaintiff contacted Nagle on July 17, the next scheduled meeting of the Planning and Zoning Commission was set for August 20, 1991. Plaintiff was ultimately heard at an August 6 Commission hearing, as the Commission held a second public hearing in August.

On July 18, plaintiff faxed a letter to Nagle, challenging the County's CUP requirement for thinspreading. Plaintiff stated his belief that the County was acting outside the law, and if it persisted with the CUP requirement, the County would be liable for damages. Anderson Deposition, Exh. 3. Plaintiff's letter also stated that "if

this matter is not performed by the close of business Friday, July 19, damages result." *Id.* Plaintiff did not appeal the CUP requirement for thinspreading to the Board of Adjustment.

Upon receiving this fax from plaintiff, Nagle contacted Douglas County Attorney, Ann L. Carrott, regarding the CUP requirement for thinspreading, and was advised that such a requirement was a "legitimate interpretation of the [Douglas County Zoning] Ordinance." Carrott Affidavit, ¶ 3. Plaintiff did submit a general[3] CUP application on July 22, but on July 25, he was informed by the City of Minneapolis that it would no longer consider his site in Douglas County for thinspreading because the City was bound by strict time restraints. Defendant's Exh.

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[3] Plaintiff states that the CUP application form he submitted was general in nature, addressing thinspreading of the Minneapolis soil, and any other soil from Hennepin County or elsewhere. However, plaintiff claims this application was altered before it came before the Planning and Zoning Board to address only this specific soil at issue in this case. The words allegedly added were: "To allow to land apply 3,660 cubic yards of petroleum contaminated soil" after the space on the application for proposed use of land in which plaintiff had typed "Section 3L attached." Anderson Affidavit, September 3, 1992, Exhs. 17 and 21. Section 3L refers to section 3.1. of the Zoning Ordinance, which lists one of the conditional uses as "Refuse areas, dumps and sanitary landfills provided they meet all applicable County and State laws." *Id.* at Exh. 20.

Even if the Zoning Office did add the above note to plaintiff's application, such conduct does not rise to the level of, or contribute in any way to, a constitutional violation of due process, as plaintiff contends. For the purposes of these cross-motions for summary judgment, this disputed fact is not "material."

9, July 25, 1991 Letter from Spurrier to Anderson. In fact, the City had already begun exploring another site on July 16, 1991, after the Alexandria Township Board initially refused to permit thinspreading on plaintiff's land. Spurrier Deposition, Exh. 5, pp. 30-31; Defendants' Exh. 12, Spurrier Memo of 7/16; Defendants' Exh. 13, Spurrier Memo of 7/17. As of July 25, the City had made the decision to proceed with the other site in Glencoe for which a conditional use permit for thinspreading had been issued by McLeod County. Defendants' Exh. 11, Approved Application for Conditional Use Permit. Spurrier testified that regardless of whether or not plaintiff was eventually successful in obtaining a CUP, the City had committed to the Glencoe site, and would no longer consider plaintiff's site. Spurrier Deposition, Exh. 5, pp. 41, 45, 46, 73.

At the August 6, 1991 public hearing before the Planning and Zoning Commission, plaintiff had the opportunity to present his CUP application. The hearing was attended by approximately 200 members of the community who, in plaintiff's words, were "extremely frightened, hostile and belligerent." Anderson Affidavit, September 3, 1992, p. 4. Plaintiff admits that he behaved rather harshly toward the panel and the community members, and described the experience as one he would not willingly undergo again. Anderson Response Memorandum, September 2, 1992, p. 2. On August 13, the County Board approved the Commission's recommendation and voted to deny the CUP permit application. The reasons given by the Board for the denial were:

1. That the applicant had failed or refused to explain the proposal.
2. That the proposed use is not sufficiently separated by distance from residential zoned land pursuant to Douglas County Ordinance, section G.1.b., page 67.
3. The project will have an adverse effect upon adjacent residential properties, pursuant to Douglas County Ordinance, section G.1.c.
4. The use is not consistent with purposes of the ordinance and the purpose of the zoning district in which the applicant intends to locate the use, pursuant to Douglas County Ordinance, section G.1.e.
5. The use is not in conformance with the land use plan to the county, pursuant to Douglas County Ordinance, section G.1.f.
6. The use is against the purpose statement of the Douglas County Ordinance which states, "the purpose of this [ordinance is to promote the public health, safety,] comfort and general welfare of the people of Douglas County [Douglas County Ordinance, p. 1].
7. Strong opposition from area property owners.
8. Strong opposition from the Alexandria Town Board.
9. The application is not consistent with Board policy adopted November 13, 1990, regarding thin spreading of contaminated soil originating outside Douglas County.

Anderson Affidavit, July 27, 1991, Exh. 12, Douglas County Board August 13, 1991 Minutes.

II. PROCEDURAL HISTORY

Plaintiff brought this action on September 23, 1991, against Douglas County, Alexandria Township, and Forum Publishing Company. Plaintiff voluntarily dismissed Forum Publishing on May 11, 1992, and reached a settlement agreement with Alexandria Township on June 9, 1992. Plaintiff was granted leave to amend the Complaint to add the individual members of the Alexandria Township Board, Douglas County Planning and Zoning Commission and Douglas County Board as defendants on May 11, 1991, but has never filed an Amended Complaint to reflect this change. Defendant Nagle[4] was added as a defendant on June 30, 1992. The amended complaint alleges the following claims against Douglas County and Dennis Nagle:

Count I:	Conspiracy on the part of the defendants to deny plaintiff his constitutional rights of Due Process and Equal Protection
Count II:	Violation of constitutional right of Due Process
Count III:	Violation of constitutional right of Equal Protection
Count IV:	Violation of 42 U.S.C. § 1982 et seq.[5]

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[4] Plaintiff does not specify whether he is suing Nagle in his official capacity, or in his individual capacity.

[5] Plaintiff states that "there is no stand alone 42 U.S.C. 1982 claim. The only manner in which 42 U.S.C. 1982 is identified is as 42 U.S.C. 1982 *et seq.*, thus meaning a reference to the entire chapter." Plaintiff's Reply Memorandum to Defendants' Motion

Count V: Violation of 42 U.S.C. § 1983

Count VI: Violation of 42 U.S.C. § 1985

Count VII: Violation of 42 U.S.C. § 1986

Plaintiff claims damages in the amount of $124,000, the amount of money he would have received from the City of Minneapolis if he had been able to thinspread the contaminated soil at issue.

Plaintiff and defendants have filed cross-motions for summary judgment, based on each party's asserted entitlement to judgment as a matter of law in the absence of genuine issues of material fact. In addition, defendant Nagle has asserted the defense of absolute or qualified immunity, and defendant Douglas County claims there is no alleged municipal custom or policy which violated plaintiff's constitutional rights, therefore precluding municipal liability under 42 U.S.C. § 1983.

III. SUMMARY OF PARTIES' RESPECTIVE POSITIONS

A. Plaintiff's Argument

At oral argument, plaintiff stated that the central issue in this case is whether the Douglas County Zoning Ordinance "applies" to thinspreading. In other words, does Douglas County have the authority to impose a requirement that persons seeking to thinspread on their own property in Douglas County first obtain a CUP from the county, even if the site and project have received tentative approval from the MPCA? If the county does

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for Summary Judgment, p. 21. Therefore, the Court will not address any claim apparently based on 42 U.S.C. § 1982 alone.

have this authority, plaintiff admitted that he has no constitutional claim under 42 U.S.C. § 1983.

Plaintiff argues that the county was without such authority by reason of federal and state preemption of the waste disposal regulation. If the county is, in fact, without the authority to require a CUP for thinspreading, then plaintiff claims that its actions denied him equal protection because other persons had been permitted to thinspread without a CUP; violated his due process rights in that the requirement of a CUP was irrational and unrelated to public safety, health and welfare concerns as thinspreading is a "safe" disposal method for contaminated soil; and that Douglas County, Nagle, and now dismissed defendant Alexandria Township, conspired against him in violating those rights by exchanging certain communications between the zoning authorities in Douglas County and Alexandria Township. Plaintiff claims that both the township and the county were against his thinspreading, and when Alexandria Township was "forced" to approve his application, Douglas County decided to establish the CUP requirement in order to quash plaintiff's application.

B. Defendant's Response

Douglas County and Nagle argue that Douglas County had the authority to require a CUP for thinspreading as the state does not have exclusive jurisdiction over the disposal of contaminated soil. Defendants maintain that federal and state laws do not automatically preempt local land use regulations such as this, and, as the CUP requirement does not conflict with any state or

federal law, the county has the right to impose such a requirement. Furthermore, defendants argue that requiring a CUP for thinspreading contaminated soil does not violate substantive due process as the scope of that doctrine is very narrow in zoning cases. Defendants also claim that plaintiff has failed to submit any credible evidence of the alleged conspiracy between defendants and Alexandria Township.

As a complete defense, defendant Nagle claims he is entitled to either absolute immunity for his legislative act of requiring a CUP for thinspreading, or qualified immunity because his actions were reasonable and did not violate a clearly established federal law of which a reasonable person would have had knowledge. The individual members of the Douglas County Planning and Zoning Commission and the Douglas County Board claim entitlement to absolute immunity on the grounds that their decision to deny the CUP was quasi-judicial. Defendant Douglas County asserts that it cannot be held liable under 42 U.S.C. § 1983 because plaintiff has not alleged or proven the existence of a municipal policy or custom which violates plaintiff's constitutional rights.

Discussion

I. 42 U.S.C. SECTION 1983

A. Elements

Section 1983 provides

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. A violation of a person's rights of equal protection or due process under color of state law would subject the perpetrator to liability.

B. Equal Protection

In the context of zoning, the equal protection clause prohibits land use authorities from treating similarly situated land owners or developers differently. The party claiming a violation of equal protection must establish that he is "similarly situated" to other applicants for the license, permit, or other benefit, particularly with respect to the same time period for application. *Castle Design & Development Co., Inc. v. City of Lake Elmo*, 396 N.W.2d 578, 582 (Minn. Ct. App. 1986). *See also Carolan v. City of Kansas City, Mo.*, 813 F.2d 178 (8th Cir. 1987) (equal protection was not violated when city more strictly enforced its building code after a major building collapse).

In this case, plaintiff claims that other persons seeking to thinspread on their property were not subject to the CUP requirement. Plaintiff specifically states that he is *not* challenging the denial of his CUP in particular, but rather that the imposition of a CUP requirement allegedly discriminates against him insofar as similarly situated people have *not* had to obtain a CUP. Plaintiff relies on the fact that before 1991, thinspreading was considered a

permitted use, and did not require any specific approval by local zoning authorities.

As specific examples of alleged unequal treatment, plaintiff cites the cases of two persons who recently began thinspreading whom he claims were not required to obtain a CUP in order to thinspread – Rollies Tank Service and the Douglas County Highway Department. Although plaintiff acknowledges that Rollies and the Highway Department eventually did obtain CUPs, he maintains that they were not required to do so until defendants imposed the requirement on him. Plaintiff reaches this conclusion based on the fact that Rollies submitted an application for thinspreading on June 14, 1991, but was not processed until July 17, 1991, the same day Nagle informed plaintiff that a CUP would be required for thinspreading. Similarly, plaintiff claims that the Highway Department applied in June, but was not informed of the CUP requirement until July 18. Even if these facts are true, plaintiff has failed to make out an equal protection challenge to the county's shift in policy from automatically signing-off on thinspreading applications to requiring a CUP.

A city or county is entitled to change its interpretation of an ordinance as long as the city or county treats everyone equally under the new interpretation. *Northwestern College v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979). *Cf. Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985) (In denying plaintiff's equal protection challenge for lack of proof that plaintiff was singled out for an invidious reason, the court said, "The Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as

the price of being allowed to enforce them at all." (citations omitted)). A county cannot be estopped from changing its interpretation of an ordinance from an incorrect interpretation to a correct one in order to better enforce the ordinance. *Frank's Nursery Sales v. City of Roseville*, 295 N.W.2d 604, 607 (Minn. 1980). *See Prior Lake Aggregates, Inc. v. City of Savage*, 349 N.W.2d 575, 580 (Minn. Ct. App. 1984) (city cannot be bound to issue special use permit by prior erroneous application of zoning ordinance).

In this case, Nagle did not violate any person's right to equal protection under the law when he reached the conclusion that thinspreading was not a "permitted use," but rather a "conditional use" which would require a CUP. Plaintiff has not established, and cannot establish, that those similarly situated applicants did not have to go through the CUP process. Even if plaintiff were the first person to be required to obtain a CUP for thinspreading, there would be no violation of equal protection as long as the requirement was consistently enforced in the future.

Plaintiff has not presented any facts which support his equal protection claim, and defendants are entitled summary judgment on Count I.

C. Due Process – Substantive

Substantive due process challenges to land use and regulation decisions demand a stringent test, as they essentially ask the court to be the final arbiter as to the issue presented before a local board with far more expertise, and interest, in local land use. *See Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (en banc) (Arnold, J. concurrence) ("I see no reason to read the Due

Process as a constitutionalized Administrative Procedure Act setting up the federal courts as a forum for the review of every run-of-the-mill land use dispute."). In order to state a substantive due process claim, a plaintiff must establish that the government action is so "egregious and irrational that the action exceeds standards of inadvertence and mere errors of law." *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990). A claim that the governmental actions are "arbitrary and capricious" does not present a claim which rises to the level of a federal due process claim. *Id.; Creative Environment, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982). *See Lemke*, 846 F.2d at 472 (Arnold, J. concurrence) (stating that permitting "simplerote allegations that the zoning decision is arbitrary and capricious. . . . [would] turn the federal district courts into zoning boards of appeal.").[6]

"[T]he theory of substantive due process is properly reserved for truly egregious and extraordinary cases, and violations of state law, in and of themselves, are not

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[6] Plaintiff argues that the standard for determination of a violation of substantive due process in the zoning area is found in *Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926). In that case, the Supreme Court defined an arbitrary and unreasonable zoning action as one which has "no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395, 47 S.Ct. at 121. However, the Eighth Circuit has adopted a heightened standard in zoning cases, finding that

> [w]hether governmental action is arbitrary or capricious within the meaning of the Constitution turns on whether it is so "egregious" and "irrational" that the action exceeds standards of inadvertence and mere errors of law.

Condor, 912 F.2d at 220. This Court is bound by the Eighth Circuit's "heightened standard."

actionable under 42 U.S.C. § 1983." *Queen Anne Court v. City of Lakeville*, 726 F.Supp. 733, 738 (D. Minn. 1989). The court also noted "[t]he wisdom of requiring a higher threshold for substantive due process claim in zoning cases. . . . " *Id.*

Plaintiff argues that the county's actions violated his substantive due process rights in two ways: 1) the decision to require a CUP for thinspreading was irrational in that it was not related to public health, safety or welfare concerns because the county authorities "knew it was not dangerous" and 2) any attempt to apply county zoning regulations to this type of thinspreading was unlawful because local authority to regulate petroleum contaminated soil is in conflict with, or preempted by, state and federal law.

> With respect to the first reason, plaintiff claims the fact of the matter [regarding thinspreading] is that the MPCA was at all times monitoring this project, thinspreading is a proven and acceptable means of treating this problem, the MPCA expert tells us that when performed under MPCA supervision, this project was of absolutely no health or safety or welfare threat.

Anderson Affidavit, September 3, 1992, p. 4. Plaintiff apparently contends that Douglas County acted irrationally by requiring a CUP for thinspreading, a process plaintiff believes is quite safe when done properly.

As plaintiff is not challenging the specific denial of his CUP application, but rather the CUP requirement itself, the nine reasons given by the Douglas County Board for denying plaintiff's CUP application are not directly relevant. However, insofar as they demonstrate

the Board's legitimate concerns for the health, safety and general welfare of the community, the reasons also indicate why the Board believes that thinspreading involves the kind of land use which requires special attention from the county's planning and zoning authorities - special attention and monitoring in the form of a CUP.

Douglas County's decision to require a CUP is not an "irrational" or "egregious" decision which would constitute a substantive due process violation. Plaintiff has failed to present any facts which would suggest that the county's decision was "irrational" to a degree necessary to maintain a substantive due process claim in the context of local zoning-decisions.

Plaintiff also asserts that defendants had no statutory authority to apply the county zoning ordinance to thinspreading of contaminated soil. Plaintiff relies on *Town of Oronoco v. City of Rochester,* 197 N.W.2d 436 (Minn. 1972) for the proposition that a local zoning ordinance which prohibits a certain activity on the land owned (or desired to be used) by a city with the power of eminent domain cannot prevail against the city's use of the land. Thus, according to plaintiff, Douglas County cannot regulate thinspreading through the requirement of a CUP because the City of Minneapolis desires to use the land and could condemn the land for thinspreading under Minn. Stat. § 465.01.

However, the Court believes the Oronoco case establishes a much narrower proposition: the "adopt[ion of] a balancing-of-public interests test for the resolution of conflicts which arise between the exercise by governmental agencies of the police power and their right of

eminent domain." *Id.* at 429. Even if one considers the City of Minneapolis the real party in interest since it is the one which needs to dispose of the contaminated soil, such a public need does not necessarily outweigh the county's interest in requiring a CUP for thinspreading. If Douglas County *prohibited* thinspreading, the situation might be different, but the mere fact that the county seeks to regulate thinspreading in the interests of public health, safety and welfare does not impose an insuperable obstacle to the City of Minneapolis' desire to thinspread on plaintiff's land in the county.

In addition, plaintiff argues that Minnesota law indicates that the state does not intend to allow local authorities to regulate in the areas of environmental protection and resource recovery. *See. e.g.*, Minn. Stat. 115B.17, subd. 11 ("When an agency or commissioner has requested a person who is responsible for a release or threatened release to take any response action under subdivision 1, no political subdivision shall request or order that person to take any action which conflicts with the action requested by the agency or commissioner of the pollution control agency."). However, plaintiff's broad conclusion that "this is an area into which local units of government shall not intrude" (Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 9) ignores the authority given to local governmental units to concurrently regulate waste to the extent such local regulation does not *conflict* with state regulation of waste. *State of Minnesota v. Apple Valley Redi-Mix*, 379 N.W.2d 136, 138 (Minn. Ct. App. 1985) ("As a general rule, conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied

terms that are irreconcilable with each other. More specifically, it has been said that conflict exists where the ordinance permits what the statute expressly forbids. Conversely a conflict exists where the ordinance forbids what the statute expressly permits. . . . [n]o conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute." (citations omitted)).

Douglas County's interpretation of its zoning ordinance to require a CUP for thinspreading, but not to prohibit thinspreading altogether, is not inherently inconsistent with the purposes of state pollution control and environmental protection regulations. *See, e.g.*, Minn. Stat. § 115A.02 ("It is the goal of this chapter to improve waste management in the state to serve the following purposes: . . . (3) Reduction in indiscriminate dependence on disposal of waste; (4) Coordination of solid waste management among political subdivisions; and (5) Orderly and deliberate development and financial security of waste facilities including disposal facilities.").

Furthermore, plaintiff does not take into account chapter 394 of the Minnesota Statutes which gives counties the authority to regulate land use. Minn. Stat. § 394.21, subd. 1 ("For the purpose of promoting the health, safety, morals, and general welfare of the community any county in the state having less than 300,000 population according to the 1950 federal census is authorized to carry on county planning and zoning activities."). Chapter 400 specifically provides that counties may regulate solid and hazardous waste, including the authority to require permits for disposal. Minn. Stat.

§§ 400.16 and 400.161. In enforcing the state's environmental regulations, the MPCA acknowledges the right of local authorities to regulate land use in their region. For instance, the MPCA application for the spreading of soil indicates that local regulations may apply:

> As part of the MPCA approval process, local units of government *must be notified* of the proposal to land apply soil. This notification is intended to provide county and city (or township) officials with the opportunity to inform the applicant of any applicable local ordinances. Policies of local governments vary throughout Minnesota, therefore, applicants are strongly encouraged to contact local officials early in the process so that a land application site is selected which meets both the requirements of the MPCA and complies with local ordinances.

Defendants' Exh. 1, MPCA document entitled Land Application of Petroleum Contaminated Soil: Single Application Sites, p. 1.

The Court concludes that Douglas County's requirement of a CUP for thinspreading is not preempted and does not conflict with state regulation of waste disposal. A similar analysis applies to the question of federal preemption.

Plaintiff asserts that the Resource Conservation and Recovery Act as amended by the Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq., and the Toxic Substances Control Act ("TOSCA"), 15 U.S.C. § 2601[7] preempt local

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[7] Federal regulations provide that TOSCA applies to material which contains levels of PCB in an amount greater than 50

regulation of waste. However, plaintiff again fails to take into account the limited nature of any preemptive effect the federal regulatory scheme has over local waste regulation. Federal law preempts state and local land use regulations only to the extent they directly conflict with federal land use regulations. *See* 42 U.S.C. § 6929 ("Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations." *See also ENSCO. Inc. v. Dumas,* 807 F.2d 743, 744 (8th Cir. 1986) ("Even where concurrent regulation is not totally precluded, however, state and local enactments are nullified to the extent they actually conflict with federal law. A conflict exists when the local enactment 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (citations omitted)). A local requirement that a CUP be obtained prior to the spreading of waste does not necessarily stand as an obstacle to waste disposal - it simply involves local authorities regulating the activity according to local health, safety and welfare needs. Such a requirement is not preempted. *Ogden Environmental Services v. City of San Diego,* 687 F. Supp. 1436, 1445 (S.D. Cal.

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parts per million. 40 C.F.R. § 761.60. The soil from the project in Minneapolis contains a highest level of only 5.7 ppm. Anderson Affidavit, July 27, 1992, Exh. 1, Letter from Foth & Van Dyke to MPCA. Therefore, TOSCA does not apply.

Plaintiff concedes that TOSCA does not preempt disposal of the soil at issue (Plaintiff's Reply Memorandum to Defendants' Motion for Summary Judgment, p. 13); therefore, the Court will not address TOSCA.

1988). Federal law does not preempt the Douglas County Zoning Ordinance requiring a CUP for thinspreading contaminated soil.

The Court concludes that plaintiff has failed to present a set of facts which would support his claim of a violation of his right to substantive due process. There are no genuine issues of material fact, and the undisputed material facts show that plaintiff did not suffer any deprivation of substantive due process.

E. Due Process - Procedural

The right to due process depends on the existence of aprotectable liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). Property interests are not created by the Constitution - "[r]ather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

In the zoning context, assuming landowners have a protectable property interest, procedural due process is afforded when the landowner has notice of the proposed government action and an opportunity to be heard. *See Littlefield v. City of Afton*, 785 F.2d 596, 603 (8th Cir. 1986); *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978) ("The basic rights of procedural due process required [when the governing body considers an application for a special-use permit] are reasonable notice of hearing and a reasonable opportunity to be heard.") Cross-examination of those who made adverse statements or state hostile opinions is not an essential element of due

process at public hearings before the planning commission. *Id.* (citations omitted).

In this case, plaintiff claims that he was not given an adequate opportunity to present his case at the August 6 and 13 Commission and County Board meetings. Plaintiff alleges that the raucous nature of the August 6 public hearing prevented him from having a real opportunity to present his case. However, the volatile nature of the meeting was due in part to plaintiff's own conduct, which he admits was "overly sharp." Plaintiff's Response Memorandum, September 2, 1992, p. 2. The Court finds that plaintiff had the opportunity to present his CUP application and try to win support for it, but failed to do so. Plaintiff also received notice of the August 13 County Board meeting, but declined to attend. Plaintiff received notice and an opportunity to be heard, and therefore, plaintiff cannot claim a denial of procedural due process.

When state procedures for appeal or other redress are available under state law, and a plaintiff fails to use such procedures, there is no denial of due process. *Kauthe v. Hartford Ins.*, 852 F.2d 951, 955 (7th Cir. 1988); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987); *Lewis v. Hillsborough Transit Authority*, 726 F.2d 664, 667 (11th Cir. 1983), *cert. denied*, 469 U.S. 822 (1984). A plaintiff cannot complain about a violation of procedural due process when the claimant has "made no attempt to avail [himself] of existing state procedures." *See Suckle v. Madison General Hosp.*, 499 F.2d 1364, 1367 (8th Cir. 1974).

After Nagle informed plaintiff that a CUP would be necessary to thinspread the contaminated soil, plaintiff could have appealed that requirement to the Board of

Adjustment. The Douglas County Zoning Ordinance specifically provides that a person can appeal the "requirement . . . of a zoning administrator" to the Board of Adjustment. Because plaintiff failed to take advantage of the appeal procedure provided by state law, he cannot claim a denial of due process. As plaintiff cannot establish any facts which would support his 42 U.S.C. § 1983 claim based on the denial of procedural or substantive due process, defendants are entitled to judgment as a matter of law with respect to this aspect of the section 1983 claim.

II. 42 U.S.C. SECTIONS 1985 AND 1986 AND COMMON LAW CONSPIRACY

A. Statutory Elements

Section 1985 provides, in relevant part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. sec. 1985(3). Section 1986 is derivative of section 1985 and provides for the liability of

> [e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same,

> neglects or refuses to do so, if such wrongful be committed. . . .

42 U.S.C. sec. 1986.

The two civil rights statutes are designed to protect persons who are members of a class which suffers from invidious discrimination. *See Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422, 1429 n. 11 (8th Cir. 1986) (§ 1985(3) is limited to cases where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," *quoting Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971)). There are four elements which a plaintiff must establish in order to prove a conspiracy claim under section 1985(3): (1) the defendants had an agreement with at least one other person and participated or caused something to be done in furtherance of the agreement; (2) the agreement was to deprive the plaintiff of a protected right; (3) the defendants were motivated by a dislike or hateful attitude toward a specific class of people and that the plaintiff was a member of that class; and (4) the conspiracy caused deprivation or injury to the plaintiff. *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 935 (D. Neb. 1986) (citation omitted).

As plaintiff is not a member of any class subject to invidious discrimination, he cannot claim relief under 42 U.S.C. 1985(3). Section 1986 is derivative of section 1985 in that it holds liable those persons who aid and abet in violations of section 1985, so plaintiff is not entitled to relief under 42 U.S.C. § 1986. *See McIntosh v. White*, 582 F.Supp. 1244 (E.D. Ark 1984).

B. Common Law Conspiracy

Conspiracy involves a combination of persons to accomplish either an unlawful purpose or a lawful purpose by unlawful means. *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D. Minn. 1991). To prove a conspiracy claim, a party must "specifically present facts tending to show agreement and concerted action." *Sponer Prod. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983). While it is true that "[c]onspirators do not make minutes of their machinations . . . [and] [s]eldom . . . can conspiracy be proved other than by circumstantial evidence" (*Scheele v. Union Loan & Fin. Co.*, 200 Minn. 554, 563, 274 N.W. 673, 678 (1937), conclusory allegations of conspiracy are insufficient. *Sponer*, 708 F.2d at 512.

In this case, plaintiff rests his allegation of conspiracy on the fact that both Alexandria Township and Douglas County were opposed to his thinspreading and that Nagle, the Douglas County Zoning Administrator, and Paul Anderson, the Alexandria Township Clerk, allegedly exchanged information regarding the thinspreading before the township and the county reached their decisions. Plaintiff places great weight on the fact that Nagle and Anderson deny any communication prior to July 18, 1991, but plaintiff discovered a fax dated July 12, from Anderson's office to Nagle's office, containing copies of plaintiff's proposal for thinspreading. Nagle is not sure how the fax arrived in his files, and does not know when, if ever, he first saw the information. Nagle Deposition, pp.

The mere exchange of information regarding a proposed activity which would have an effect on both the township and the county is not a "fact tending to show agreement and concerted action." Sponer. 708 F.2d at 512. Plaintiff has failed to come forward with specific facts which create a genuine issue of material fact as to a conspiracy between Nagle and Anderson, and defendants are entitled to judgment as a matter of law.

III. DEFENDANTS' ENTITLEMENT TO IMMUNITY

In light of the Court's determination that neither Nagle nor the individual members of the Planning and Zoning Commission and of the Douglas County Board deprived plaintiff of any constitutional rights pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, or engaged in a common law conspiracy against him, it is unnecessary to decide if Nagle or the other individuals are entitled to absolute or qualified immunity. Likewise, the Court will not decide whether Douglas County is subject to municipal liability under section 1983, as the Court has found no evidence of a violation of plaintiff's constitutional rights.

IV. PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff seeks leave to amend his complaint, for the fourth time, to allege (1) a violation of the Commerce Clause constituting the violation of a federally protected right under 42 U.S.C. § 1983; (2) preemption and conflict of laws as a basis for his claim that defendants lacked authority to impose a CUP requirement on thinspreading; and (3) punitive damages against Nagle. This motion is

untimely and in direct opposition to prior dictates in this case. All non-dispositive motions were to be filed and heard by June 30, 1992. Plaintiff's three previous motions to amend were made within the appropriate time period, but in the order granting plaintiff's third amendment to the Complaint, Magistrate Judge Cudd stated that

> this Court shall not allow plaintiff to continue to amend his complaint indefinitely. The type of inartful drafting of Plaintiff's earlier motion to amend with leave of court that has resulted in this unnecessary proceeding shall not be tolerated. Plaintiff is an attorney and his lack of attention to detail is no excuse. . . . Plaintiff is cautioned that any further motion to amend necessitated by Plaintiff's failure to attend to detail shall not be looked upon with favor and may result in an award of attorney's fees upon proper motion by Defendants.

June 30, 1992 Order.

While the Court recognizes that motions to amend are to be liberally granted (*Mercantile Trust Company National Assoc. v. Inland Marine Product Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976), in light of Magistrate Judge Cudd's clear warning to plaintiff, as well as this Court's determination in this Order with respect to plaintiff's other claims, the Court will deny plaintiff's motion for leave to amend. The Court notes that plaintiff has failed to allege any new facts which would give rise to a new claim, and does not offer any explanation for the delay in seeking to allege these new claims.[8]

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[8] Plaintiff asserts that *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S.Ct. 2019 (1992), decided by the Supreme Court four days *after* he filed his

Order

Based upon the files, records, arguments of counsel and proceedings herein, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Summary Judgment is DENIED;

2. Defendants' Motion for Summary Judgment is GRANTED; and

3. Plaintiff's Motion, in the Alternative for Leave to Amend is DENIED;

4. Defendants' Motion for Attorney's Fees and Expenses is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY,

Dated: November 9, 1992

/s/ Richard H. Kyle
RICHARD H. KYLE
United States
District Court

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motion for leave to amend the third time, provides a new basis in law for his Commerce Clause claim. However, the Court rejects this contention as the *Fort Gratiot* opinion does not create new law out of whole cloth, but rather clarifies the existing interpretation of the Commerce Clause. It would have been entirely possible for plaintiff to assert a Commerce Clause challenge before *Fort Gratiot*.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3758MNST

James R. Anderson, Appellant, vs. Douglas County, et al., Appellees.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

October 1, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

42 USC 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

14th Amendment to U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.